

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

OAKLAND EDUCATION ASSOCIATION,

Charging Party,

v.

OAKLAND UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SF-CE-2283-E

PERB Decision No. 1529

June 20, 2003

Appearance: Beeson, Tayer & Bodine by Thomas Dubberke, Attorney, for Oakland Education Association.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Oakland Education Association (OEA) of a Board agent's partial dismissal of their unfair practice charge. The charge, as amended, alleged that the Oakland Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by retaliating and discriminating against teacher Ron Robinson (Robinson) for engaging in protected activity and for interfering with his rights under EERA. OEA alleged that this conduct constituted a violation of EERA section 3543.5(a).²

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

²EERA section 3543.5(a) provides:

It shall be unlawful for a public school employer to do any of the following:

Upon review of the unfair practice charge, amended charge, the Board agent's warning and partial dismissal letters, the complaint, and OEA's appeal, the Board reverses the Board agent's partial dismissal and remands that portion of the charge to the General Counsel's office for issuance of an amended complaint, consistent with the discussion below.

BACKGROUND

The following comprises a summary of OEA's charge, as amended. Beginning in fall 1999, Robinson was employed as a temporary teacher with an emergency permit at McClymonds High School (McClymonds). During the 1999-2000 school year, Robinson became a faculty member of the II/USP Whole School Reform Committee, and from that time through the end of his tenure at McClymonds, he served on the Climate subcommittee of the II/USP Whole School Reform Committee. The Climate Committee was comprised of ten members and was intended to improve the overall climate for McClymonds teachers, students and administrators. From the 1999-2000 school year through the end of his tenure, Robinson also served as a faculty member of the McClymonds' Leadership Team. Teacher members of both groups regularly presented concerns involving terms and conditions of employment, teacher morale and student discipline.

During the 1999-2000 school year, there appeared to be conflict between committee members and McClymonds Principal Lynn Dodd (Dodd) on such issues as student discipline, tardiness policies and teacher morale. Robinson became a particularly strong advocate on

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

behalf of the teachers. Robinson alleges that in early fall 2000, he was elected chair to the II/USP Whole School Reform Committee and the Climate Committees. During the spring of 2001, there was a specific recommendation from the Climate Committee and Leadership Team regarding the institution of an intervention room as part of a student disciplinary program, which would be staffed through a grant from the Alameda County Probation Department. Dodd vetoed the idea and would not allow it to be presented before the Leadership Team for action. At a fall 2000 Leadership Team meeting, Robinson objected to Dodd's characterization that student disciplinary problems were caused by teacher "classroom management." Robinson stated that Dodd's statements were responsible for low teacher morale. At committee meetings, Robinson also presented a proposal for teachers to evaluate administrators in order to improve morale. According to OEA, Dodd did not receive this proposal kindly.

In April 2001, Robinson was injured pursuing a student involved in an altercation. An administrator did not appear on the scene until 20 minutes after he was notified by other teachers. On April 27, 2001, Robinson wrote a memo complaining about the poor security with regard to this and other incidents of student violence. This memo was copied to OEA Representative, Bruce Colwell (Colwell).

In early June 2001, Dodd called Robinson to meet regarding the April 27 memo. In this conversation, Dodd asked why Robinson copied the letter to OEA and whether he was really committed to McClymonds. Also during the conversation, out of apparent concern for his job, Robinson asked Dodd if she was committed to keeping him at McClymonds. Dodd replied that she would commit to rehiring Robinson for the following school year.

In mid-June 2001, the District sent Robinson a letter that he would not be rehired for the 2001-2002 school year. Robinson informed Sue Woehrle (Woehrle), Dodd's immediate supervisor, that Dodd had committed to his rehire. Robinson stated that he learned that Dodd was interviewing prospective candidates for his position. Robinson asked Woehrle to write a letter on his behalf and she refused. Consequently, Robinson wrote to District Superintendent Dennis Chaconas (Chaconas) and separately to School Board member Harold Pendergrass regarding his employment with the District and copied the latter document to OEA. In August 2001, Robinson sent another letter to Chaconas with a copy to OEA. Woehrle subsequently called him to meet with Dodd and her. When Robinson asked to bring an OEA representative to the meeting, Woehrle responded:

Damn it; to hell with the Union! I'm sick of the union; I'm sick of teachers always thinking they need to have representation. You should be man enough to sit down with us without union representation. Either you meet with us or you don't, but if you want the contract you have to meet with us.

In mid-August 2001, Robinson met with Woehrle and Dodd without a union representative. At this meeting Woehrle and Dodd complained to Robinson about his bringing outsiders into internal school business. Subsequently, however, Robinson received a probationary contract for the 2001-2002 school year.

During the spring, the Climate Committee and Leadership Team identified priorities for improving teacher morale, which were recorded in the meeting minutes. The minutes were to be presented at a faculty retreat in August 2001. Before the retreat, Dodd told Robinson that he was not to distribute or discuss the minutes at the retreat.

In December 2001, in order to obtain additional monies for McClymonds, Robinson offered to start a faculty council. Dodd discouraged his participation because he ran "enough

committees” and further stated that he should give “one of the women a shot.” According to OEA, there was no faculty council established at McClymonds until March 2002, when Robinson drafted instructions for elections.

In December 2001, Vice Principal Norman Thompson (Thompson) observed Robinson’s classroom. In January 2002, he issued a written evaluation of Robinson, which stated in part:

Teacher is making every effort to make standard base [sic]
learning/teaching the heart of the course.

In January 2002, Robinson handed out a lesson plan to students, which contained two essays: an essay by Frederick Douglas (Douglas), who wrote about teaching himself to read, and a “provocative prompt” that argued that students today have no interest in reading. On January 16, Robinson was called by Thompson and asked to meet with Thompson and Dodd regarding a memorandum sent to parents, that the matter was serious, and that Robinson should bring a union representative. As the site representative was not available, he contacted Colwell, who could meet the following day. Dodd expressed anger at having to wait and attempted to discourage Robinson from bringing his representative. Dodd ultimately consented to wait until Colwell could attend. During the January 17, meeting, Robinson learned that a parent had received a copy of the provocative prompt, but not the Douglas essay, and believed the essay to be insulting to students. Robinson felt that his explanation of the purpose of the essay to Dodd and Thompson resolved the matter.

On January 31, 2002, Robinson chaired and took minutes of a Climate Committee meeting. Robinson submitted the minutes to Dodd by memorandum dated February 1, 2002. The minutes stated that lack of administrative support was responsible for low morale. The memo also mentioned that teachers and students were upset about the school’s direction since

the transfer of another activist teacher, Mark Rader (Rader), in October 2001. Rader was transferred allegedly because he lacked a CLADT³ certificate but was otherwise fully credentialed; yet, he was replaced by teachers who also lacked CLADT certificates.

In late February or early March 2002, Robinson ran for the OEA executive board. He posted flyers in McClymond's main office, visible to administrators. On March 15, 2002, Robinson received a notice of non-reelection from the District for the 2002-2003 school year. In a March 25 meeting with Dodd, Thompson and the OEA site representative, Dodd stated that he was not teaching to state content standards and not sticking to text. Robinson responded that this contradicted Thompson's January 2002 evaluation. He had not received any notice prior to March 25 that there was a problem with his performance.

In April 2002, Thompson issued a memo to Robinson regarding Robinson showing his students the R-rated movie, "The Hurricane," without obtaining parent consent. Robinson alleges that he had already discussed showing this movie to his class with Thompson who had not seemed concerned. According to Robinson, other teachers had shown R-rated movies without first obtaining parental consent and without repercussion.

On May 13, Robinson sent two memoranda to Dodd regarding unresolved Climate Committee and Leadership Team issues involving teacher morale and teacher recommendations. One of the memos discussed the benefits of a program for teacher evaluation of administrators. By letter dated May 17, the District informed Robinson that he was being placed on administrative leave with pay effective May 20 to allow the District to investigate allegations of unprofessional conduct at McClymonds. A District administrator later informed Robinson that the reason for the administrative leave was Robinson's behavior

³The charge did not define this acronym.

at the May 14 Faculty Council meeting. Robinson remained on administrative leave status through the end of the school year. He has received no further information from the District regarding the outcome of its investigation.

OEA alleged that at the May 14 meeting, Robinson had a heated exchange with Assistant Principal Tami Bell (Bell), at which Bell later said to Robinson, “We can take this outside and deal with this privately if you’d like.” Another teacher who attended the Leadership Team meeting has confirmed that Bell made this statement. Bell was not disciplined for his conduct.

BOARD AGENT’S PARTIAL DISMISSAL

The Board agent issued a complaint alleging that the District violated EERA section 3543.5(a) and (b) by issuing Robinson a notice of non-reelection because of his exercise of protected rights, including service on school-wide leadership committees and presentation of contractual and work-related issues to the District, and because of the District’s denial of OEA’s right to represent employees, respectively.

However, the Board agent found that the District did not violate EERA by placing Robinson on administrative leave. In the warning and dismissal letters, the Board agent gives much credence to allegations obtained from the District.⁴

The partial dismissal describes the District’s reasoning for placing Robinson on Administrative Leave with pay on May 17. According to the Board agent, at the May 14

⁴The District formally responded to the amended charge for the first time on November 27, 2002, the same date OEA’s appeal was filed with the Board. The dismissal had already been issued on November 6, 2002. The District’s response contained no explanation for its lateness. In addition, there is no evidence that this response was served on OEA or the Board, other than a copy to OEA’s legal counsel, by notation on the November 27 letter. In light of these facts, the Board shall not consider this document in evaluating OEA’s appeal.

Faculty Council meeting, Robinson distributed a letter, which stated that some faculty members were afraid to speak because of retaliation. He asked the Council members to sign the letter but they refused. On May 15, Dodd received a letter from a Faculty Council member who was present at the May 14 meeting, which stated that Robinson seemed irrational and delusional, and wanted to take his frustration out on the McClymonds family. That individual believed Dodd to be the target of Robinson's anger. Dodd later received a letter from another Faculty Council member, which said essentially the same thing. The second letter was quoted in the warning and partial dismissal letters. The authors of these letters are not identified.

The Board agent concluded that based on the facts in the original and amended charge, the charge failed to demonstrate the nexus between Robinson's administrative leave and his protected activity, as required by the test in Novato Unified School District (1982) PERB Decision No. 210 (Novato). She found that the District appeared to have followed proper disciplinary procedures and had provided substantial evidence regarding its decision to place Robinson on administrative leave, citing the two letters received by the District, both of which indicated concern for Dodd's safety. The Board agent notes that OEA does not refute these letters in the amended charge and so fails to provide additional evidence of nexus.⁵

DISCUSSION

OEA appeals the Board agent's determination that OEA did not state a prima facie case of retaliation when the District placed Robinson on administrative leave because of alleged protected conduct involving Robinson's two May 13 memoranda to Dodd.⁶ We hold that OEA

⁵The claim for interference was not addressed in the warning or dismissal letters.

⁶OEA did not appeal the interference claim. The Board therefore will not address this issue.

stated a prima facie case for retaliation for the reasons discussed below. The Board will also address the new evidence presented in OEA's appeal.

To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato; Carlsbad Unified School District (1979) PERB Decision No. 89.)

First, the Board has held that employees' complaints to administrators regarding working conditions are protected under EERA. (See e.g., Los Angeles Unified School District (1999) PERB Decision No. 1338, proposed dec., at p. 7.) Robinson's May 13 memoranda to Dodd complaining about McClymonds' working environment therefore falls under this category of protected conduct. Second, Dodd, the principal, clearly had knowledge of Robinson's protected conduct. Third, the District's imposition of involuntary leave is a form of adverse action. (See, e.g., California State University, Long Beach (1987) PERB Decision No. 641-H; California State University, Hayward (1991) PERB Decision No. 869-H.)

The key issue on appeal is whether OEA demonstrated sufficient nexus between the adverse action and the protected conduct to state a prima facie case of retaliation. To support a prima facie finding of "nexus" between the adverse action and the protected conduct, OEA must allege that the timing of the employer's adverse action occurred in close temporal proximity to the employee's protected conduct (North Sacramento School District (1982) PERB Decision No. 264 (No. Sacramento)), plus facts establishing one or more of the following additional factors. (Moreland Elementary School District (1982) PERB

Decision No. 227.) These additional factors include: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; No. Sacramento.)

We find that OEA alleged sufficient facts to show the “nexus” required for a prima facie case for retaliation. First, the adverse action occurred in close temporal proximity to Robinson’s protected conduct. Robinson sent Dodd two memoranda regarding teacher concerns on May 13; and on May 17, Robinson was placed on administrative leave. Second, the amended charge alleges that Robinson was treated disparately from Assistant Principal Bell, who engaged in similar conduct during a heated argument with Robinson at the May 14 Faculty Council meeting. Additionally, Bell allegedly threatened Robinson. However, Robinson was placed on administrative leave and Bell was not. Third, according to OEA, the District did not inform Robinson of the reason for administrative leave until a later time. Fourth, as of the date OEA filed its amended charge in October 2002, the District had not provided Robinson with a report on the outcome of its investigation regarding Robinson’s alleged unprofessional conduct.

As a result, we disagree with the Board agent's analysis regarding "nexus." In the dismissal, the factors required for a showing of "nexus" appear to be confused with facts comprising the District's affirmative defense to a charge of retaliation. The Board agent gave credence to the District's position in finding that Robinson was placed on administrative leave because two unnamed Faculty Council members wrote letters to Dodd, which stated that they perceived Robinson to be a threat to Dodd. Likewise, the Board agent also found that the District followed the appropriate procedures in placing Robinson on leave.⁷ In the dismissal, the Board agent stated:

The District appears to have followed proper disciplinary procedures and has provided substantial evidence regarding its decision to place Mr. Robinson on administrative leave. As noted above, the District received letters from employees stating their concern for the Principal's safety. Charging Party has not claimed the letters are inaccurate or false, and thus the charge fails to provide any additional evidence of nexus. [At p. 5.]

However, in retaliation cases, only once the inference of unlawful motivation is alleged, does the burden shift to the employer to establish that it would have taken the action regardless of the employee's protected conduct. (Novato, at p. 14; State of California (Department of Industrial Relations) (1998) PERB Decision No. 1299-S, at pp. 11-12; Scotts Valley Union Elementary School District (1994) PERB Decision No. 1052, at p. 17.) The District's allegations thus comprise its defense to OEA's allegations of nexus, information which should be considered during the Board's hearing process. (Novato;⁸ Golden Plains Unified School

⁷The District's procedures for placing Robinson on leave are not described in the file.

⁸In Novato at pages 13-14, the Board explained the requirements for establishing a prima facie violation of EERA section 3543.5(a) and the resulting shift of burden to the employer to show that it would have imposed the adverse action regardless of the employee's protected conduct. On page 14, the Board stated:

District (2002) PERB Decision No. 1489.) Since we have already determined that OEA has stated a prima facie violation for retaliation, we find it appropriate to overturn the partial dismissal and remand this charge to the General Counsel's office for issuance of an amended complaint.

We now address the new evidence that OEA has presented in support of its charge. In its appeal, OEA attached a declaration that contradicts the District's reasons for placing Robinson on administrative leave, as articulated in the dismissal. PERB Regulation 32635(b)⁹ provides:

Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.

The Board is normally reluctant to accept new evidence for the first time on appeal. In South San Francisco Unified School District (1990) PERB Decision No. 830 (South San Francisco), the Board opined:

The purpose of PERB Regulation 32635(b) is to require the charging party to present its allegations and supporting evidence to the Board agent in the first instance, so that the Board agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case.

Once the charging party has made a prima facie showing sufficient to support the inference that the exercise of employee rights granted by EERA was a motivating factor, . . . the burden shifts to the employer to prove that its action(s) would have been the same despite the protected activity. (Citations.)

The shifting burden merely requires the employer to make what is actually an affirmative defense to the prima facie case of wrongful motive. [Emphasis added.]

⁹PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The Board held in South San Francisco and subsequent decisions that good cause did not exist to allow a party to raise new evidence because no explanation was offered.¹⁰ In addition, the Board has held that where the charging party has had the opportunity to cure defects at earlier stages of the proceeding and did not do so, the Board will not allow the presentation of that evidence on appeal. (Regents of UC.)

As we have already determined that OEA's charge states a prima facie case, there is no need for presentation of this rebuttal evidence at this stage of the Board's process. However, we are troubled by issues raised by OEA in its appeal.

First, OEA unsuccessfully requested copies of the letters in question during a phone conversation with the Board agent on October 7, 2002, a conversation which occurred after the issuance of the warning letter but before OEA filed the amended charge. As a result, OEA asserts that it was unable to refute the specific allegations in these letters, not knowing their entire contents, nor presumably their authors.

Second, in its amended charge, OEA offered an alternative version of the events at the May 14 Faculty Council meeting, which places Robinson's alleged behavior in a different light. The amended charge alleges that an administrator participated in a heated exchange with Robinson and threatened Robinson, but that only Robinson was disciplined.

In its appeal, OEA states that it did not believe that it needed to contradict the facts in the two letters. The warning letter contained the standard advisory language, which directs the charging party to amend the charge to correct factual inaccuracies or provide additional facts. However, the paragraph discussing the basis for dismissing the charge focused on the District's

¹⁰See Regents of the University of California (1994) PERB Decision No. 1058-H (Regents of UC) and cases cited at fn. 8, page 4.

decision not to reelect Robinson for the following school year. But the warning letter did not address the District's placement of Robinson on administrative leave. Therefore, it is reasonable that OEA did not believe that it would need to contradict the substance of the two letters in its amended charge. Since the information in the letters comprises the District's defense to the charge, it is also reasonable that OEA would assume that it was not necessary to contradict the letters in its amended charge. The declaration from the OEA site representative attached to OEA's appeal specifically counters the information in the two letters. Since the Board is remanding this allegation for issuance of an amended complaint, OEA may introduce this declaration at the appropriate time in accordance with PERB rules and regulations.

ORDER

The Board REVERSES the Board agent's partial dismissal in Case No. SF-CE-2283-E and REMANDS the case to the General Counsel's office for issuance of an amended complaint consistent with this Decision.

Members Neima and Baker joined in this Decision.